

109TH CONGRESS
1ST SESSION

S. 2066

To amend the Occupational Safety and Health Act of 1970 to further improve the safety and health of working environments, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 18, 2005

Mr. ENZI (for himself, Mr. ISAKSON, Mr. CRAIG, Mr. BURR, Mr. ROBERTS, Mr. SESSIONS, Mr. WARNER, Mr. GREGG, and Mr. DEMINT) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Occupational Safety and Health Act of 1970 to further improve the safety and health of working environments, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; REFERENCES.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Occupational Safety Fairness Act”.

6 (b) REFERENCE.—Whenever in this Act an amend-
7 ment or repeal is expressed in terms of an amendment
8 to, or repeal of, a section or other provision, the reference
9 shall be considered to be made to a section or other provi-

1 sion of the Occupational Safety and Health Act of 1970
 2 (29 U.S.C. 651 et seq.).

3 **SEC. 2. WORKSITE-SPECIFIC COMPLIANCE METHODS.**

4 Section 9 of the Act (29 U.S.C. 658) is amended by
 5 adding at the end the following:

6 “(d) A citation issued under subsection (a) to an em-
 7 ployer who violates section 5, any standard, rule, or order
 8 promulgated pursuant to section 6, or any regulation pro-
 9 mulgated under this Act shall be vacated if such employer
 10 demonstrates that the employees of such employer were
 11 protected by alternative methods that are substantially
 12 equivalent or more protective of the safety and health of
 13 the employees than the methods required by such stand-
 14 ard, rule, order, or regulation in the factual circumstances
 15 underlying the citation.

16 “(e) Subsection (d) shall not be construed to elimi-
 17 nate or modify other defenses that may exist to any cita-
 18 tion.”.

19 **SEC. 3. DISCRETIONARY COMPLIANCE ASSISTANCE.**

20 Subsection (a) of section 9 of the Act (29 U.S.C.
 21 658(a)) is amended—

22 (1) by striking the last sentence;

23 (2) by striking “If, upon” and inserting “(1) If,
 24 upon”; and

25 (3) by adding at the end the following:

1 “(2) Nothing in this Act shall be construed as prohib-
2 iting the Secretary or the authorized representative of the
3 Secretary from providing technical or compliance assist-
4 ance to an employer in correcting a violation discovered
5 during an inspection or investigation under this Act with-
6 out issuing a citation, as prescribed in this section.

7 “(3) The Secretary or the authorized representative
8 of the Secretary—

9 “(A) may issue a warning in lieu of a citation
10 with respect to a violation that has no significant re-
11 lationship to employee safety or health; and

12 “(B) may issue a warning in lieu of a citation
13 in cases in which an employer in good faith acts
14 promptly to abate a violation if the violation is not
15 a willful or repeated violation.”.

16 **SEC. 4. EXPANDED INSPECTION METHODS.**

17 (a) PURPOSE.—It is the purpose of this section to
18 empower the Secretary of Labor to achieve increased em-
19 ployer compliance by using, at the Secretary’s discretion,
20 more efficient and effective means for conducting inspec-
21 tions.

22 (b) GENERAL.—Section 8(f) of the Act (29 U.S.C.
23 657(f) is amended—

24 (1) by adding at the end the following:

1 “(3) The Secretary or an authorized representative
 2 of the Secretary may, as a method of investigating an al-
 3 leged violation or danger under this subsection, attempt,
 4 if feasible, to contact an employer by telephone, facsimile,
 5 or other appropriate methods to determine whether—

6 “(A) the employer has taken corrective actions
 7 with respect to the alleged violation or danger; or

8 “(B) there are reasonable grounds to believe
 9 that a hazard exists.

10 “(4) The Secretary is not required to conduct an in-
 11 spection under this subsection if the Secretary believes
 12 that a request for an inspection was made for reasons
 13 other than the safety and health of the employees of an
 14 employer or that the employees of an employer are not
 15 at risk.”.

16 **SEC. 5. OCCUPATIONAL SAFETY AND HEALTH REVIEW**
 17 **COMMISSION.**

18 (a) INCREASE IN NUMBER OF MEMBERS AND RE-
 19 QUIREMENT FOR MEMBERSHIP.—Section 12 of the Act
 20 (29 U.S.C. 661) is amended—

21 (1) in the second sentence of subsection (a)—

22 (A) by striking “three members” and in-
 23 serting “five members”; and

24 (B) by inserting “legal” before “training”;

1 (2) in the first sentence of subsection (b), by
2 striking “except that” and all that follows through
3 the period and inserting the following: “except that
4 the President may extend the term of a member for
5 no more than 365 consecutive days to allow a con-
6 tinuation in service at the pleasure of the President
7 after the expiration of the term of that member until
8 a successor nominated by the President has been
9 confirmed to serve. Any vacancy caused by the
10 death, resignation, or removal of a member before
11 the expiration of a term for which a member was ap-
12 pointed shall be filled only for the remainder of such
13 term.”; and

14 (3) by striking subsection (f), and inserting the
15 following:

16 “(f) For purposes of carrying out its functions under
17 this Act, two members of the Commission shall constitute
18 a quorum and official action can be taken only on the af-
19 firmative vote of at least a majority of the members par-
20 ticipating but in no case fewer than two.”.

21 (b) NEW POSITIONS.—Of the two vacancies for mem-
22 bership on the Occupational Safety and Health Review
23 Commission created by subsection (a)(1)(A), one shall be
24 appointed by the President for a term expiring on April

1 27, 2009, and the other shall be appointed by the Presi-
 2 dent for a term expiring on April 27, 2011.

3 (c) EFFECTIVE DATE FOR LEGAL TRAINING RE-
 4 QUIREMENT.—The amendment made by subsection
 5 (a)(1)(B), requiring a member of the Commission to be
 6 qualified by reason of a background in legal training, shall
 7 apply beginning with the two vacancies referred to in sub-
 8 section (b) and all subsequent appointments to the Com-
 9 mission.

10 **SEC. 6. AWARD OF ATTORNEYS' FEES AND COSTS.**

11 The Act (29 U.S.C. 651 et seq.) is amended by redes-
 12 ignating sections 32, 33, and 34 as sections 33, 34, and
 13 35, respectively, and by inserting after section 31 the fol-
 14 lowing new section:

15 “AWARD OF ATTORNEYS’ FEES AND COSTS

16 “SEC. 32.

17 “(a) ADMINISTRATIVE PROCEEDINGS.—An employer
 18 who—

19 “(1) is the prevailing party in any adversary
 20 adjudication instituted under this Act, and

21 “(2) had not more than 100 employees and a
 22 net worth of not more than \$7,000,000 at the time
 23 the adversary adjudication was initiated,

24 shall be awarded fees and other expenses as a prevailing
 25 party under section 504 of title 5, United States Code,
 26 in accordance with the provisions of that section, but with-

1 out regard to whether the position of the Secretary was
 2 substantially justified or special circumstances make an
 3 award unjust. For purposes of this section the term ‘ad-
 4 versary adjudication’ has the meaning given that term in
 5 section 504(b)(1)(C) of title 5, United States Code.

6 “(b) PROCEEDINGS.—An employer who—

7 “(1) is the prevailing party in any proceeding
 8 for judicial review of any action instituted under this
 9 Act, and

10 “(2) had not more than 100 employees and a
 11 net worth of not more than \$7,000,000 at the time
 12 the action addressed under subsection (1) was filed,
 13 shall be awarded fees and other expenses as a prevailing
 14 party under section 2412(d) of title 28, United States
 15 Code, in accordance with the provisions of that section,
 16 but without regard to whether the position of the United
 17 States was substantially justified or special circumstances
 18 make an award unjust. Any appeal of a determination of
 19 fees pursuant to subsection (a) of this subsection shall be
 20 determined without regard to whether the position of the
 21 United States was substantially justified or special cir-
 22 cumstances make an award unjust.

23 “(c) APPLICABILITY.—

1 “(1) COMMISSION PROCEEDINGS.—Subsection
2 (a) shall apply to proceedings commenced on or after
3 the date of enactment of this section.

4 “(2) COURT PROCEEDINGS.—Subsection (b)
5 shall apply to proceedings for judicial review com-
6 menced on or after the date of enactment of this
7 section.”.

8 **SEC. 7. JUDICIAL DEFERENCE.**

9 Section 11(a) of the Act (29 U.S.C. 660(a)) is
10 amended in the sixth sentence by inserting before the pe-
11 riod the following: “, and the conclusions of the Commis-
12 sion with respect to questions of law that are subject to
13 agency deference under governing court precedent shall be
14 given deference if reasonable”.

15 **SEC. 8. CONTESTING CITATIONS UNDER THE OCCUPA-**
16 **TIONAL SAFETY AND HEALTH ACT OF 1970.**

17 (a) IN GENERAL.—Section 10 of the Act (29 U.S.C.
18 659) is amended—

19 (1) in the second sentence of subsection (a), by
20 inserting after “assessment of penalty” the fol-
21 lowing: “(unless such failure results from mistake,
22 inadvertence, surprise, or excusable neglect)”; and

23 (2) in the second sentence of subsection (b), by
24 inserting after “assessment of penalty” the fol-

1 lowing: “(unless such failure results from mistake,
2 inadvertence, surprise, or excusable neglect)”.

3 (b) **EFFECTIVE DATE.**—The amendments made by
4 this section shall apply to a citation or proposed assess-
5 ment of penalty issued by the Occupational Safety and
6 Health Administration that is issued on or after the date
7 of the enactment of this Act.

8 **SEC. 9. RIGHT TO CORRECT VIOLATIVE CONDITION.**

9 Section 9 of the Act (29 U.S.C. 658), as amended
10 by section 2, is amended by adding at the end the fol-
11 lowing:

12 “(f) The Commission may not assess a penalty under
13 section 17(c) for a non-serious violation that is not re-
14 peated or willful if the employer corrects the violative con-
15 dition and provides the Secretary an abatement certifi-
16 cation within 72 hours.”.

17 **SEC. 10. WRITTEN STATEMENT TO EMPLOYER FOLLOWING**
18 **INSPECTION.**

19 Section 8 of the Act (29 U.S.C. 657) is amended by
20 adding at the end the following:

21 “(i) At the closing conference after the completion of
22 an inspection, the inspector shall—

23 “(1) inform the employer or a representative of
24 the employer of the right of such employer to re-

1 quest a written statement described in paragraph
2 (2); and

3 “(2) provide to the employer or a representative
4 of the employer, upon the request of such employer
5 or representative, with a written statement that
6 clearly and concisely provides the following informa-
7 tion:

8 “(A) The results of the inspection, includ-
9 ing each alleged hazard, if any, and each cita-
10 tion that will be issued, if any.

11 “(B) The right of the employer to contest
12 a citation, a penalty assessment, an amended
13 citation, and an amended penalty assessment.

14 “(C) An explanation of the procedure to
15 follow in order to contest a citation and a pen-
16 alty assessment, including when and where to
17 contest a citation and the required contents of
18 the notice of intent to contest.

19 “(D) The Commission’s responsibility to
20 affirm, modify, or vacate the citation and pro-
21 posed penalty, if any.

22 “(E) The informal review process.

23 “(F) The procedures before the Occupa-
24 tional Safety and Health Review Commission.

1 “(G) The right of the employer to seek ju-
2 dicial review.

3 “(j) No monetary penalty may be assessed with re-
4 spect to any violation not identified in the written state-
5 ment requested under subsection (i).”.

6 **SEC. 11. TIME PERIODS FOR ISSUING CITATIONS.**

7 Section—

8 (1) 9(a) of the Act (29 U.S.C. 658(a)) is
9 amended—

10 (A) by striking “upon inspection” and in-
11 serting “upon the initiation of inspection”;

12 (B) by striking “with reasonable prompt-
13 ness” and inserting “within thirty working
14 days”; and

15 (C) by inserting after the first sentence,
16 the following: “Such 30 day period may be
17 waived by the Secretary for good cause shown,
18 including, but not limited to, cases involving
19 death, novel issues, large or complex worksites,
20 or pursuant to an agreement by the parties to
21 extend such period.”; and

22 (2) 10(a) of the Act (29 U.S.C. 659(a)) is
23 amended—

24 (B) by striking “within a reasonable time”
25 and inserting “within thirty days”; and

1 (C) by inserting after the first sentence,
2 the following: “Such 30 days period may be
3 waived by the Secretary for good cause shown,
4 including, but not limited to, cases involving
5 death, novel issues, large or complex worksites,
6 or pursuant to an agreement by the parties to
7 extend such period.”.

8 **SEC. 12. TIME PERIODS FOR CONTESTING CITATIONS.**

9 Section 10 of the Act (29 U.S.C. 659) is amended
10 by striking “fifteen” each place it appears and inserting
11 “thirty”.

12 **SEC. 13. PENALTIES.**

13 Section 17 of the Act (29 U.S.C. 666) is amended
14 by inserting the following:

15 “(m) The Secretary shall not use ‘other than serious’
16 citations as a basis for issuing repeat or willful citations.”.

17 **SEC. 14. UNANTICIPATED CONDUCT.**

18 Section 9 of the Act (29 U.S.C. 658) is amended by
19 adding at the end the following:

20 “(d) No citation may be issued under this section for
21 any violation that is the result of actions by any person
22 that are contrary to established, communicated, and en-
23 forced work rules that would have prevented the violation.
24 This subsection shall not be construed to eliminate or

1 modify elements of proof currently required to support a
2 citation.”.

3 **SEC. 15. ADOPTION OF NON-GOVERNMENTAL STANDARDS.**

4 The Act (29 U.S.C. 651 et seq.) is amended by add-
5 ing after section 4 the following:

6 **“SEC. 4A. ADOPTION OF NON-GOVERNMENTAL STANDARDS.**

7 “The Secretary shall not promulgate or enforce any
8 finding, guideline, standard, limit, rule, or regulation that
9 is subject to incorporation by reference, or modification,
10 as the result of a determination reached by any organiza-
11 tion, unless the Secretary affirmatively finds that the de-
12 termination has been made by an organization and proce-
13 dure that complies with the requirements of section 3(9).
14 Such finding and a summary of its basis shall be published
15 in the Federal Register and shall be deemed a final agency
16 action subject to review by a United States District Court
17 in accordance with section 706 of title 5, United States
18 Code.”.

19 **SEC. 16. EMPLOYEE RESPONSIBILITY.**

20 The Act (29 U.S.C. 651 et seq.) is amended by add-
21 ing after section 9 the following:

22 **“SEC. 9A. EMPLOYEE RESPONSIBILITY.**

23 “(a) IN GENERAL.—Notwithstanding any other pro-
24 vision of this Act, an employee who, with respect to em-
25 ployer-provided personal protective equipment, willfully

1 violates any requirement of section 5 or any standard,
2 rule, or order promulgated pursuant to section 6, or any
3 regulation prescribed pursuant to this Act, may be as-
4 sessed a civil penalty, as determined by the Secretary, but
5 not to exceed \$50 for each violation.

6 “(b) CITATIONS.—If, upon inspection or investiga-
7 tion, the Secretary or the authorized representative of the
8 Secretary believes that an employee of an employer has,
9 with respect to employer-provided personal protective
10 equipment, violated any requirement of section 5 or any
11 standard, rule, or order promulgated pursuant to section
12 6, or any regulation prescribed pursuant to this Act, the
13 Secretary shall within 30 days issue a citation to the em-
14 ployee. Each citation shall be in writing and shall describe
15 with particularity the nature of the violation, including a
16 reference to the provision of this Act, standard, rule, regu-
17 lation, or order alleged to have been violated. No citation
18 may be issued under this section after the expiration of
19 6 months following the occurrence of any violation.

20 “(c) NOTIFICATION.—

21 “(1) IN GENERAL.—The Secretary shall notify
22 an employee—

23 “(A) by certified mail of a citation under
24 subsection (b) and the proposed penalty; and

1 “(B) that such employee has 30 working
2 days within which to notify the Secretary that
3 the employee wishes to contest the citation or
4 proposed penalty.

5 “(2) FINAL ORDER.—If an employee does not
6 file a notification described in paragraph (1)(B) with
7 the Secretary within 30 working days, the citation
8 and proposed penalty shall—

9 “(A) be deemed a final order of the Com-
10 mission; and

11 “(B) not be subject to review by any court
12 or agency.

13 “(d) CONTESTING OF CITATION.—

14 “(1) IN GENERAL.—If an employee files a noti-
15 fication described in paragraph (1)(B) with the Sec-
16 retary within 30 working days, the Secretary shall
17 immediately advise the Commission of such notifica-
18 tion, and the Commission shall afford the employee
19 an opportunity for a hearing in accordance with sec-
20 tion 554 of title 5, United States Code.

21 “(2) ISSUANCE OF FINAL ORDER.—The Com-
22 mission, after a hearing described in paragraph (1),
23 shall issue an order, based on findings of fact, af-
24 firming, modifying, or vacating the Secretary’s cita-
25 tion or proposed penalty, or directing other appro-

- 1 priate relief. Such order shall become final 30 days
- 2 after issuance of the order.”.

○